

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP980

Cir. Ct. No. 2012CV424

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF NORTH HUDSON,

PLAINTIFF-RESPONDENT,

V.

RANDY J. KRONGARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

¶1 STARK, J.¹ Randy Krongard appeals a circuit court order affirming the denial of his motion to vacate a municipal court default judgment. Krongard argues the circuit court erred in determining the Village of North Hudson's

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 versions unless otherwise noted.

ordinance regulating “junk vehicles” is constitutional and was validly adopted under the Village’s WIS. STAT. § 61.34 power to regulate for the health, safety, and welfare of the public. We disagree with Krongard’s arguments and affirm.

BACKGROUND

¶2 In November of 2011, Krongard received two citations from the Village of North Hudson for violating article II, chapter 90, § 44 of the Village Code.² Krongard was cited for having two vehicles in plain view on his property that were deemed junk due to expired registrations.

² Krongard was cited under NORTH HUDSON VILLAGE ORDINANCE § 90-44, which is entitled, “Removal and impoundment of junk vehicles,” and provides:

(a) No person shall leave in plain view upon private property a junk vehicle for a period in excess of five days. A vehicle is in plain view if it is not in a fully enclosed garage or covered with an automotive car cover as described in subsection (b) of this section.

(b) If the police department finds a junk vehicle on private property, the department shall notify the owner of the real estate to within five days either remove the vehicle to a fully enclosed garage or to completely cover the junk vehicle with a weatherproof, nontransparent commercial car cover; no tarpaulin or other covering device shall be acceptable. There shall never be more than two covered junk vehicles on private property at any time. Notice shall be by regular and certified mail. If the vehicle is not so removed or covered within five days from the date the notice is sent, the police department shall issue a citation under section 90-42 and upon court order shall cause the vehicle to be removed to a suitable place for 30 days. The cost of removal will be charged to the owner of the real estate upon which the vehicle was located. If the vehicle is not claimed after 30 days, it shall be disposed of as provided in this article. If the vehicle is claimed by the owner, all reasonable charges for handling, storage and removal shall be paid by the owner to the village; and the village shall have a lien upon the vehicle until such charges have been paid.

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¶3 Krongard, originally pro se, pleaded not guilty in municipal court on December 14, 2011. However, he failed to appear at his scheduled trial and the court entered a default judgment against him on January 25, 2012. On March 27, now represented by counsel, Krongard moved to vacate the municipal court’s default judgment. His motion to vacate was based on his argument that the “Village of North Hudson Ordinance No. 90-44 is void, unlawful and invalid as preempted, contrary and inconsistent with WIS. STATS. §§ 342.40, 346.55, 349.03 and 349.06 and inconsistent with the foregoing provisions of law.”

¶4 The municipal court denied Krongard’s motion to vacate the default judgment. The court found Krongard failed to show he had a “meritorious defense under [WIS. STAT. § 806.07(1)] to grant relief from the default judgment” because he failed to include “any supporting papers, affidavits, or other sworn statements of fact.”

¶5 Krongard appealed. The circuit court dismissed his appeal, explaining there was “nothing in the municipal court record or presented to this Court that supports or justifies relief from the default judgment While he attempts to argue the merits of his case, that would have been appropriate at the Municipal Court trial, had he been present.”

¶6 Krongard then appealed the circuit court’s order to this court. *See Village of North Hudson v. Krongard*, No. 2012AP2238, unpublished slip op. (WI App Mar. 12, 2013). Krongard continued to assert the Village’s ordinance

NORTH HUDSON VILLAGE ORDINANCE § 90-41 defines a junk vehicle as “any vehicle or part of a vehicle that is without current license plates and current registration or application, or is disabled in such a manner and to an extent that it cannot legally be driven on the public roadways of this state.”

improperly conflicted with state traffic regulations in chapters 341 to 348 and 350, which preempted the field of traffic regulations. The Village's ordinance, Krongard argued, "impermissibly defines unregistered vehicles as junk vehicles and regulates unregistered vehicles on private property." According to Krongard, the circuit court therefore erred in upholding a void judgment.

¶7 The Village responded that its ordinance and the state traffic regulations could not be inconsistent because they regulated "two completely different issues." While § 90-44 was "concerned with the upkeep of private property," the state traffic regulations were concerned "with the licensing, regulation of, outfitting and operation of vehicles[.]"

¶8 This court remanded to the circuit court with instructions. We stated,

[T]he Village's argument regarding the purpose of the ordinance and the ordinance's language itself suggest[s] that the ordinance is not a traffic regulation and the Village did not enact it pursuant to the power granted under the state traffic regulations. Instead, it appears the ordinance may have been enacted using a different power, such as its zoning authority. *See, e.g.*, WIS. STAT. §§ 61.35; 62.23(7) (grant of power to enact ordinances to promote "health, safety, morals or general welfare of the community").

However, because it cannot be determined from the record whether the ordinance in question is a traffic regulation or part of a different regulatory scheme, the order is reversed and the matter remanded to the circuit court to determine the validity of the Village's ordinance. If the ordinance is valid under the Village's alternative authority, Krongard's default judgment is not void and the circuit court should deny Krongard's motion to vacate the judgment. If the ordinance was adopted under its authority from the state traffic regulations, Krongard's default judgment is void because of its inconsistency and the judgment must be dismissed.

¶9 On remand, the circuit court analyzed § 90-44 for the specific purpose of determining first, whether it was a traffic regulation or part of a different regulatory scheme, and second, dependent on the authority under which it was adopted, whether the ordinance was valid. The circuit court delivered a reasoned and thorough analysis, determining “this regulation, because of the way it is written, its location within the Village Ordinances, and the Village’s alternative definition of junk vehicle, falls under the Village’s ‘health, safety, welfare’ power granted in WIS. STAT. § 61.34.” It also found the ordinance was a constitutionally valid exercise of that § 61.34 power. As a result, the circuit court denied Krongard’s motion to vacate the default judgment on March 21, 2014. This appeal follows.

DISCUSSION

¶10 We restrict our review solely to those issues considered by the circuit court on remand from this court to determine whether § 90-44 was a traffic regulation and whether it was constitutional.³ “The interpretation and application

³ In the instant appeal, Krongard argues all of Article II, chapter 90 of the Village’s Code, and WIS. STAT. § 342.40, which governs abandoned vehicles, are unconstitutional in violation of the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and the Wisconsin Constitution, article 1, sections 1, 3, and 11. However, we address only Krongard’s challenge to the constitutionality of § 90-44 for several reasons.

First, Krongard admitted he consciously chose not to raise arguments pertaining to the constitutionality of WIS. STAT. § 342.40 at the circuit court level or on his previous appeal. Krongard has clearly waived his right to our review of these arguments. *See State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Even without the clear waiver, we agree with the circuit court’s decision that § 342.40 is not at issue here. That statute regulates “abandoned vehicles.” Krongard was never cited for having an “abandoned vehicle” under § 90-42. He was cited for having a “junk vehicle.” In addition, none of his vehicles were towed or impounded as “abandoned vehicles” or “junk vehicles” under the forfeiture, impoundment and disposal procedures set forth in § 90-45. Therefore, his arguments on these issues have no bearing on our resolution of this case and will not be addressed.

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of an ordinance to an undisputed set of facts is a question of law, which this court decides de novo.’ The constitutionality of an ordinance is also a question of law, which this court reviews de novo.” *Town of Rhine v. Bizzell*, 2008 WI 76, ¶13, 311 Wis. 2d 1, 751 N.W.2d 780 (citations omitted). We note “the cardinal rule of statutory construction is to preserve a statute and find it constitutional if it is at all possible to do so.” *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633 (1967).

¶11 On appeal, Krongard first renews his argument that chapter 90 is a traffic regulation inconsistent with, and preempted by, the Wisconsin Motor Vehicle Code. The State of Wisconsin preempted the field of traffic regulations by its enactment of chapters 341 to 348 and 350. *See* WIS. STAT. § 349.03(1); *City of Janesville v. Walker*, 50 Wis. 2d 35, 36-37, 183 N.W.2d 158 (1971). The Wisconsin Supreme Court explained when a regulation is considered a traffic regulation in *Garthwaite*, stating, “The plain meaning of the term, traffic regulation, must be construed to mean any regulation which directly affects or is incident to vehicle operation regardless of the purpose for which it was enacted.” *City of Janesville v. Garthwaite*, 83 Wis. 2d 866, 869, 266 N.W.2d 418 (1978) (ordinance prohibiting excessive noise by squealing tires or engine acceleration was consistent with and not preempted by the motor vehicle code). Krongard asserts that § 90-44 “on its face ‘directly affects or is incident to vehicle operation’ under the standard set forth in ... *Garthwaite*.” *Id.*

Second, when the circuit court addressed Krongard’s arguments on remand, it stated that § 90-44 was the only provision under its review and it would not address the constitutionality of Article II, chapter 90 as a whole. Therefore, despite Krongard’s assertion that the provisions are “expressly intertwined” and must be addressed, only his challenges to the constitutionality of § 90-44 have been properly preserved for our review.

¶12 Krongard appears to operate under the mistaken belief that because § 90-44 concerns motor vehicles, it must necessarily be a traffic regulation. This ignores the fact that § 90-44 does not affect—directly or incidentally—motor vehicle *operation*. Rather, as the circuit court aptly noted on remand, it “simply requires owners of inoperable or unlicensed vehicles to keep their vehicles out of the public’s view, either by storage in a fully enclosed garage or by weatherproof, non transparent commercial car cover.”

¶13 The Village itself has repeatedly asserted that its ordinance has nothing to do with the operation of motor vehicles on highways or city streets, but simply addresses the problem of uncovered junk vehicles. The Village argues such vehicles, when left in plain view for extended periods of time, foreseeably “cause dangerous and hazardous conditions or become an attractive nuisance for children.”

¶14 We reject Krongard’s contention that § 90-44 is a traffic regulation that “directly affects or is incident to” the operation of a vehicle. *See Garthwaite*, 83 Wis. 2d at 869. Section 90-44 does not regulate any aspect of vehicle operation. Rather, § 90-44 is an exercise of the Village’s police power consistent with its goals of promoting safety, the upkeep of property, and preservation of property values. In addition, § 90-44 is located in the “Miscellaneous Police Provisions” section of the Village code, and not within the Village’s traffic regulations section, further eroding any support for Krongard’s position.

¶15 The circuit court’s second task on remand was to determine whether § 90-44 is constitutional. Krongard raises due process concerns that the Village’s provisions in Article II are overbroad and vague. He also argues the provisions are “unconstitutional in failing to provide pre-deprivation notice and opportunity

for meaningful hearing to contest a ‘police notice’ that a vehicle has been ‘deemed’ by the Village of North Hudson Police Department as ‘abandoned or junk’” in violation of Amendments I, V and XIV of the U.S. Constitution, and article 1, sections 1 and 3 of the Wisconsin Constitution.

¶16 The Village responds that Krongard had multiple contacts with police about the perceived violations, providing him with notice and ample opportunity to cure the problem. Krongard was provided with formal notice of the violations when he was cited after the problem persisted. Pursuant to the ordinance provisions, Krongard then had the opportunity to appear before the municipal court and contest the citations. However, he did not avail himself of that opportunity. Under these circumstances, we agree with the Village that Krongard was not deprived of notice or the opportunity for a meaningful hearing to contest his citations.

¶17 Krongard’s overbreadth and vagueness arguments regarding § 90-44 also fail. An ordinance is vague if it is “so obscure that [persons] of ordinary intelligence must necessarily guess as to its meaning and differ as to its applicability.” *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 16-20, 291 N.W.2d 452 (1980). It is overbroad “when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate.” *Id.* at 19. As the circuit court noted:

[S]ection (a) of Ordinance No. 90-44 explicitly outlines that the junk vehicle must be in plain view, which is defined within this subsection, for a period of five days for there to be a violation. There is no ambiguity or uncertainty as to what is required for compliance and as such, gives fair notice regarding the conduct that constitutes a violation. In addition, subsection (b) lays out a step by step process with reference to the procedure if a “junk vehicle” is found in violation of the ordinance; again this gives an individual fair notice of what is required for

compliance and the procedure for remedy of a violation. Lastly, the definition of a “junk vehicle” is unambiguously outlined in Ordinance No. 90-41 as one without current license plates, current registration or application, or is disabled in such a manner and to an extent it cannot be legally driven on public roadways of the State. [Citations omitted.]

We agree. There is no indication that Krongard could reasonably have any question as to what constituted a violation of § 90-44, or the consequences for such a violation. Further, as discussed above, the language of the ordinance is tailored to activity that the Village is permitted to regulate. The Village’s ordinance is neither vague nor overbroad.

¶18 Krongard next attempts to challenge the constitutionality of § 90-44 on First Amendment free speech grounds. However, he does not engage in a proper First Amendment analysis or argue the Village has impinged upon his freedom of expression. Instead, he baldly asserts “citizens have a First Amendment right to refuse to comply with a police order to cover or garage unregistered vehicles on their residential property which are not ‘junk vehicles’ or ‘junked vehicles’ as defined by State law.” We need not consider arguments that are undeveloped. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶19 Finally, we decline to address Krongard’s Fourth Amendment argument that chapter 90 authorizes unreasonable seizures of vehicles. Krongard argues that the circuit court failed to address his primary objection “that under § 90-42, ‘notwithstanding sections 90-43 and 90-44,’ a person may be penalized and their allegedly ‘junk vehicle’ towed ‘if a violation remains uncorrected after the passage of the initial five-day notice.’” We will not consider this argument because it improperly concerns a hypothetical future taking. No one towed,

impounded, or in any way seized Krongard's vehicles. Indulging in hypothetical scenarios or offering advisory opinions is beyond the scope of legitimate appellate review. *See Brown v. LaChance*, 165 Wis. 2d 52, 58, 477 N.W.2d 296 (Ct. App. 1991).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

